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Supreme Court of the United States.

OCTOBER TERM, 1938.

No. 685. 7

IN THE MATTER OF

THE NEW YORK, NEW HAVEN AND HARTFORD RAILROAD COMPANY, *Debtor.*

HOWARD S. PALMER ET ALL.,

Petitioners,

v.

THE COMMONWEALTH OF MASSACHUSETTS,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THE POINT OF DECISION OF WHICH REVIEW IS SOUGHT.

The single question raised on this petition is whether the United States District Court in Connecticut, sitting as a court of bankruptcy in railroad reorganization proceedings under section 77 of the Bankruptcy Act (11 U.S.C.A. 205), had authority to direct the abandonment of passenger service in Massachusetts upon lines which the debtor Railroad continues to own and operate for freight service, notwithstanding the pendency of proceedings for abandonment instituted by the trustees of the debtor Railroad before the

Massachusetts Department of Public Utilities, duly vested with authority to grant or disallow such abandonment.

No constitutional issue is involved. The power of Congress to delegate such authority to the District Courts was conceded. "The question is merely one of statutory interpretation" (Swan, J., dissenting, Record, 148).

The respondent Commonwealth submits that the majority judges (Learned Hand and Augustus N. Hand, JJ.) were right in holding that Congress did not delegate such authority to the District Courts, and that this decision is not in conflict with the decisions of this Court or with those of other Circuit Courts of Appeals.

Discussion.

(1) The power to allow or disallow a railroad to abandon passenger service upon lines within the state resides in the several states in the absence of federal legislation displacing that power, subject only to judicial review to determine that the state action offends no constitutional guaranties and does not place an undue burden on interstate commerce.

Atlantic Coast Line R.R. Co. v. *North Carolina Corporation Commission*, 206 U.S. 1, 19.

Missouri Pacific Ry. Co. v. *Kansas*, 216 U.S. 262, 276, 278, 279.

Chicago, Burlington & Quincy R.R. Co. v. *Railroad Commission of Wisconsin*, 237 U.S. 220, 226, 227.

Chesapeake & Ohio Ry. v. *Public Service Commission of the State of West Virginia*, 242 U.S. 603, 607, 608.

Mississippi Railroad Commission v. *Mobile & Ohio R.R. Co.*, 244 U.S. 388, 390, 391.

Fort Smith Light & Traction Co. v. *Bourland City Commissioners*, 267 U.S. 330, 332, 333.

This power of the states to regulate is not impaired by the constitutional grant to Congress to regulate interstate commerce, but exists in full force until displaced by legislation enacted by Congress.

Lake Shore & Michigan Southern Ry. Co. v. *Ohio*, 173 U.S. 285, 299-301.

Harlan, J.:

> ". . . While the laws of the States must yield to acts of Congress passed in execution of the powers conferred upon it by the Constitution, *Gibbons* v. *Ogden*, 9 Wheat. 1, 211, the mere grant to Congress of the power to regulate commerce with foreign nations and among the States did not, of itself and without legislation by Congress, impair the authority of the States to establish such reasonable regulations as were appropriate for the protection of the health, the lives and the safety of their people. . . . Until displaced by such national legislation as Congress may rightfully establish under its power to regulate commerce with foreign nations and among the several States, the validity of the statute, so far as the commerce clause of the Constitution of the United States is concerned, cannot be questioned."

(2) In Massachusetts the power has been lodged by the Legislature in the Department of Public Utilities, subject to judicial review by the Supreme Judicial Court of the Commonwealth.

The Department of Public Utilities of Massachusetts derives its authority from the Massachusetts General Laws (Tercentenary Ed.) c. 25, together with certain other provisions contained in chapter 159, "Common Carriers," and chapter 160, "Railroads" (Record, 7).

Chapter 160, sec. 128, provides that "A railroad corporation which has established and maintained a passenger station throughout the year for five consecutive years at any point upon its railroad shall not abandon such station . . ., nor substantially diminish the accommodation furnished by the stopping of trains thereat as compared with that furnished at other stations on the same railroad, except with the written approval of the department after notice posted in and on said station for a period of thirty days immediately preceding a public hearing thereon."

And see—

Boston & Albany R.R. v. *New York Central R.R.*, 256 Mass. 600, 618.

(3) *The states' power was not displaced by the Interstate Commerce Act, under which the Interstate Commerce Commission was given no power to deal with partial abandonment of service, such as passenger service alone, but only with total abandonment of lines and the operation thereof when affecting interstate commerce, specifically reserving to the states power to require reasonable freight and passenger service for intrastate business when not inconsistent with the Commission's lawful orders.*

The Interstate Commerce Act, Act Feb. 1920, c. 91; 41 Stat. 474, as amended (49 U.S.C.A. sec. 1, par. 18), provides:

". . . no carrier by railroad subject to this chapter shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the commission a certificate that the present or future public convenience and necessity permit of such abandonment."

The Interstate Commerce Commission has held that this does not confer upon the Commission power to authorize

a partial discontinuance of rail service, such as the abandonment merely of passenger service on a branch line.

Public Convenience Application of K. C. S. Ry., 94 I.C.C. 691, 692.
Morris & Essex R. Co. Proposed Abandonment, 175 I.C.C. 49, 52.

The Act specifically reserves the right of the states to require reasonable passenger service for intrastate business,

> "*Provided, however,* That nothing in this chapter shall impair or affect the right of a State, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the commission made under the provisions of this chapter."

(4) The states' power was not displaced by Section 77 of the Bankruptcy Act.

(a) The express provisions of the statute dealing with abandonment of lines, property and operations.

The statute as originally enacted in 1933 contained no provisions for the sale or abandonment of unprofitable lines or operations.

After two years of experience under the Act, the need of some such provisions became apparent and they were recommended to Congress by the Federal Coordinator of Transportation.

> "Minor amendments are necessary, designed to facilitate the abandonment of unremunerative branches of service" (74th Congress, House Doc. 89).

This suggestion led to the enactment of two subsections (c, 6) and (o), neither of which, however, gave the Court power to authorize abandonment of service on retained lines.

Section (c, 6) (see Appendix, *infra*, p. 10), dealing with rejection of unexpired leases of lines, authorized not the Court, but the Interstate Commerce Commission, to authorize an abandonment of operations on lines whose leases were rejected.

Section (o) (see Appendix, *infra*, p. 10) authorized the Court to permit abandonment of "lines and other property," but not operations, with the approval and authorization of the Interstate Commerce Commission when required by the Interstate Commerce Act.

It will be observed, therefore, that the Federal Coordinator's suggestion for amendments "to facilitate the abandonment of unremunerative branches of service" was given effect in section (o) only in so far as abandonment of branches of service involved outright abandonment or sale of the line itself.

And this was a sound distinction for Congress to make. For while a railroad may lawfully surrender its unprofitable franchises—

> *Brooks-Scanlon Co.* v. *Railroad Commission of Louisiana*, 251 U.S. 396, 399;
> *Bullock* v. *Railroad Commission of Florida*, 254 U.S. 513, 520;
> *Railroad Commission of Texas* v. *Eastern Texas R.R. Co.*, 264 U.S. 79, 85, 86;
> *Wolff Co.* v. *Industrial Court*, 262 U.S. 522, 543—

it may not retain those franchises and refuse to comply with the constitutional conditions for service upon which they were granted, without legislative or congressional sanction.

Cases cited *supra*, at p. 2.

Cf. *Colorado* v. *United States*, 271 U.S. 153, 165.

Transit Commission v. *United States*, 284 U.S. 360, 369.

The exercise of such sanction Congress appears not to have chosen to delegate to the bankruptcy courts.

And as such power would be in derogation of the sovereign powers of the states, it surely ought not to be implied in the absence of apt and explicit language.

(b) The general provisions of the statute dealing with jurisdiction of the debtor and its property.

Failing to find an explicit grant of authority to the bankruptcy courts to permit abandonment of service on retained lines, the petitioners seek to spell out such authority from the general terms of the Act dealing with jurisdiction.

Subsection (a) confers on the Court "exclusive jurisdiction of the debtor and its property" and the powers of federal courts in cases where they have appointed receivers in equity (Petitioner's brief, p. 17).

"Exclusive jurisdiction of the debtor and its property" naturally refers to jurisdiction of judicial tribunals, not to tribunals which are legislative agents.

Both Congress and this Court have been solicitous in holding inviolate the functions of such state tribunals.

Section 266 of the Judicial Code provides that only a three-judge court may determine that the decisions of state tribunals are confiscatory (28 U.S.C.A. sec. 380).

And this Court has repeatedly held that the deliberations of such tribunals are not to be prevented or forestalled even upon the ground that the holding of the hearing would result in irreparable damage.

Myers v. *Bethlehem Corporation*, 303 U.S. 41, 51.

Lawrence v. *St. Louis-San Francisco Ry. Co.*, 274 U.S. 588, 595.

Western & Atlantic R.R. v. *Georgia Public Service Commission*, 267 U.S. 493, 496.

Henderson Water Co. v. *Corporation Commission*, 269 U.S. 278.

It is only when the state tribunal refuses to act at all that the Court may proceed in disregard of it, as in—

Crawford v. *Duluth St. Ry. Co.*, 60 Fed. (2d) 212 (C.C.A. 7th).

The inherent power of the Court to protect the property in its custody "from invasion" (*In Re Tyler*, 149 U.S. 164, 181) does not, therefore, contemplate or permit the ouster of the state legislative or administrative tribunals.

Congress has further provided in section 65 of the Judicial Code that a receiver in any United States Court "shall manage and operate" the property in receivership "according to the requirements of the valid laws of the state in which such property shall be situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof" (28 U.S.C.A. sec. 124).

Under this statute a railroad receiver must operate the road according to the laws of the state in which it is situated.

Erb v. *Morasch*, 177 U.S. 584.

United States v. *Harris*, 177 U.S. 305.

Mercantile Trust Co. v. *Tennessee Central R. Co.*, 286 Fed. 425 (D.C. Tenn. 1922).

Pittsburgh Shawmut Coal Co. v. *Delaware & N. R. Co.*, 289 Fed. 133 (D.C. N.Y. 1923).

Cf. *Gillis* v. *State of California*, 293 U.S. 62, in which it was held that, where a California statute required a dis-

tributor of motor vehicle oil to obtain a license and surety bond to secure the payment of taxes, a receiver of such distributor could not operate the business in disregard of that law even though it was impossible to furnish the bond.

The Massachusetts law required that a railroad could abandon passenger stations only with the approval of the Department of Public Utilities. The trustees, endowed with the authority of federal equity receivers, were subject to this law.

It is only after the plan of reorganization has been approved that section (f) provides it shall prevail over all state laws and the orders of any state authority (11 U.S.C.A. sec. 203 f). And this obviously cannot have reference to partial abandonment of services upon retained lines, for as soon as the bankruptcy court releases the reorganized railroad from its jurisdiction, the authority of the state commission to prescribe service would necessarily reattach, if it had ever been suspended.

We respectfully submit, therefore, that the decision of the Circuit Court of Appeals is indubitably correct in law, that it is in harmony with the decisions of this Court and of the other Circuit Courts of Appeals, and that therefore there is no occasion for its further review.

Respectfully submitted,

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March 9, 1939.

Appendix.

Act of Mar. 3, 1933, 47 Stat. 1477, c. 204, as amended by Acts of Aug. 27, 1935, c. 774, 49 Stat. 911; June 26, 1936, c. 833, 49 Stat. 1969, "Reorganization of Railroads Engaged in Interstate Commerce":

"(c) After approving the petition:

. . . . . .

"(6) If a lease of a line of railroad is rejected, and if the lessee, with the approval of the judge, shall elect no longer to operate the leased line, it shall be the duty of the lessor at the end of a period to be fixed by the judge to begin the operation of such line, unless the judge, upon the petition of the lessor, shall decree after hearing that it would be impracticable and contrary to the public interest for the lessor to operate the said line, in which event it shall be the duty of the lessee to continue operation on or for the account of the lessor until the abandonment of such line is authorized by the Commission in accordance with the provisions of section 1 of Title 49."

. . . . . .

"(o) The trustee or trustees, from time to time, shall determine what lines or portions of lines of railroad and what other property of the debtor, if any, should be abandoned or sold during the pendency of the proceedings in the interest of the debtor's estate and of ultimate reorganization but without unduly or adversely affecting the public interest, and shall present to the judge petitions, in which other parties in interest may join, for authority to abandon or to sell any such property; and upon order of the judge made after a hearing pursuant to such reasonable notice by publication or otherwise as the judge may direct to parties in

interest, authorizing any such abandonment or sale, but only with the approval and authorization of the Commission when required by chapter 1 of Title 49, as amended February 28, 1920, or as it may be hereafter amended, the trustee or trustees shall take all steps and carry out all proceedings necessary for the consummation of any such abandonment or sale in accordance with the order of the judge. . . ."